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In The

Supreme Court of the United States

October Term, 1988

JAMES C. HOWES

Petitioner,

v.

NORTH DAKOTA
WORKERS COMPENSATION BUREAU,
AND LEINGANG STEEL SIDING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

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QUESTIONS PRESENTED

1. WHETHER, IN AN ADMINISTRATIVE PROCEEDING, IT IS A DENIAL OF CONSTITUTIONAL DUE PROCESS FOR A STATE AGENCY TO PROCURE AND RELY ON WRITTEN EVIDENCE WHILE REFUSING TO MAKE THE MAKER OF THAT WRITTEN EVIDENCE AVAILABLE FOR CROSS-EXAMINATION.

2. WHETHER A PARTY'S CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS IN AN ADMINISTRATIVE HEARING IS LIMITED BY STATE STATUTE.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, James C. Howes, and the respondents, North Dakota Workers Compensation Bureau and Leingang Steel Siding.

Supreme Court Rule 28.1, insofar at it involves filing a list of parent and subsidiary companies, is not applicable to this case.

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No. _____

In The

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October Term, 1988

JAMES C. HOWES

Petitioner,

v.

NORTH DAKOTA
WORKERS COMPENSATION BUREAU,
AND LEINGANG STEEL SIDING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

The Appellant, James C. Howes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of North Dakota, entered in the above-entitled proceeding on September 20, 1988.

OPINIONS BELOW

The opinion of the North Dakota Supreme Court is reported at 429 N.W.2d 730, and is contained in the appendix hereto, p. App. 1, *infra.*

The Memorandum Decision of the district court of the South Central Judicial District of North Dakota will not be reported; however, it is reprinted in the appendix hereto.

JURISDICTION

The petitioner filed a claim for Workers Compensation benefits with the Workers Compensation Bureau of North Dakota. On September 14, 1987, the Workers Compensation Bureau issued an Order denying benefits. On petitioner's appeal, the South Central Judicial District of North Dakota entered a judgment on December 30, 1987, affirming the Order denying benefits. On petitioner's appeal from that judgment, the Supreme Court of North Dakota issued a judgment on September 20, 1988, affirming the South Central Judicial District's judgment. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the North Dakota Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, 14th Amendment, paragraph 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

James C. Howes, petitioner, was employed as a manual laborer by Leingang Steel Siding, Inc., of Mandan, North Dakota. While at work, on July 10, 1985, Howes struck his head on an overhanging steel bar of a horse trailer. Although able to finish work, Howes became dizzy and nauseous, he developed a severe headache later that day and entered a local hospital. Howes was diagnosed as having suffered a craniocerebral trauma and was hospitalized five days. Subsequently, Howes filed a claim for workers compensation benefits with the North Dakota Workers Compensation Bureau (hereinafter Bureau). The Bureau is the state administrative agency charged with administering North Dakota's workers compensation laws, including the statutorily created workers compensation fund. *See* Title 65, North Dakota Century Code (hereinafter N.D. Cent. Code). The Bureau accepted liability and paid out medical expenses and disability benefits to Howes for the period from July 11, 1985, to July 21, 1985.

Following the July 10, 1985, injury, Howes continued to have headaches, suffering mild headaches on almost a daily basis and severe headaches approximately twice

each month. In April of 1986, Howes' headaches became so severe that he was admitted to the hospital and remained there for approximately twenty-one days. After his hospitalization, Howes sought to have the Bureau pay his medical expenses incurred as a result of his headaches.

The Bureau denied liability without a formal hearing. Howes then requested a rehearing, and the Bureau granted Howes a formal hearing. Prior to that hearing, Howes made a written request that the Bureau afford him an opportunity to cross-examine persons furnishing any evidence relied upon by the Bureau in making its decision. Howes also renewed this request at the formal hearing when his counsel stated that "[i]f the Bureau intends to rely on medical evidence in the file, to which I have not been allowed an opportunity to examine the expert witnesses, I would request that opportunity prior to a decision." The Bureau refused to afford Howes an opportunity to cross-examine those witnesses which it subsequently relied upon in denying Howes' claim for benefits.

Howes appealed to the state district court and, in the brief before that court, raised the issue of deprivation of his right to due process because he was not afforded the right of cross-examination. That court affirmed the Bureau's decision stating that an agency is not bound by the formal rules of evidence (Memorandum Opinion). Howes then appealed to the North Dakota Supreme Court, again raising the issue presented to this Court. That court, after conducting a review of the Bureau's decision, pursuant to the North Dakota Administrative Agencies Practice Act contained at Chapter 28-32, N.D.

Cent. Code, by a divided vote (3-2), affirmed the Bureau's decision.

The North Dakota Supreme Court determined that, because the North Dakota Administrative Agencies Practice Act afforded Howes the general opportunity to subpoena witnesses at his own expense, he was not denied due process of law by the Bureau's failure to afford him an opportunity to cross-examine the medical experts on which the Bureau relied (opinion of the court at 429 N.W.2d 730). Thus, the North Dakota Supreme Court has held that an administrative agency, when relying upon evidence solicited and used by the agency in rendering a decision adverse to a party, does not deprive that party of the constitutional protection of due process by requiring that party to expend his own funds in order to subpoena or otherwise produce the maker of that evidence for examination.

REASONS FOR GRANTING THE WRIT

I.

The North Dakota Supreme Court's decision that an administrative agency may procure and rely on evidence without making the maker of that evidence available for cross-examination deprives parties before North Dakota administrative agencies of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The North Dakota Supreme Court has determined that a state administrative agency, when conducting a formal hearing, does not have to afford a party before that agency an opportunity to cross-examine witnesses

procured and relied on by the agency. In doing so, the North Dakota Supreme Court determined that this practice did not violate the dictates of procedural due process in light of § 28-32-09, N.D. Cent. Code, which affords a party the right to subpoena witnesses at formal hearings, because the party, at his own expense, could subpoena the persons furnishing information to the agency. To require a party before an administrative agency to bear the cost of producing a person who has supplied written information to the administrative agency at the agency's solicitation in order for the party to examine that person is totally contrary to the dictates of procedural due process. Such a drastic misreading of the dictates of due process, which will be applied throughout the course of North Dakota's administrative practice, deserves this Court's attention.

While there is no set requirement for what process a party must be afforded by an administrative agency (*see e.g., Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)), it is well recognized that "[w]hen adjudicative facts are in dispute, our legal tradition is that the party affected is entitled not only to rebut or explain but also to 'confront his accusers' and to cross-examine them." 2 Davis, *Administrative Law Treatise* § 12:9 (2d ed. 1979). There is no doubt that adjudicative facts were in dispute at the hearing conducted by the Bureau. The primary adjudicative fact was the determination of what caused Howes' headaches; which was also the subject addressed by the witnesses whom Howes was not allowed to cross-examine.

The ability to cross-examine a witness is the fundamental tool by which a party may test the strength and

validity of a witness' statements. As this Court stated in *The Ottawa*, 70 U.S. (3 Wall.) 268, 271, 18 L. Ed. 165 (1865):

> Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, and as a means of ascertaining the order of the events as narrated by the witness in his examination in chief, and the time and place when and where they occurred, and the attending circumstances, and of testing the intelligence, memory, impartiality, truthfulness, and integrity of the witness; but a few questions, well directed to those several objects are in general amply sufficient to effect all that can well be accomplished by the fullest enjoyment of that admitted right.

See also Green v. McElroy, 360 U.S. 474, 496-97, 3 L. Ed. 2d 1377, 79 S. Ct. 1420 (1959) (discussing the vital importance of cross-examination to test the value of human statements).

Requiring a party to expend his own resources in order to cross-examine a witness effectively denies that party of an opportunity to cross-examine the witness because that party will often lack the financial ability to secure the appearance of the agency's witness. This is especially true in cases before the North Dakota Workers Compensation Bureau because parties/claimants have usually been disabled and thus have no income.

This Court has previously recognized that when an adjudicatory hearing is conducted by an administrative agency, the party whose interest is at stake must be afforded the opportunity to cross-examine witnesses. In *I.C.C. v. Louisville & Nashville R. Co.*, 227 U.S. 88, 93, 33 S. Ct. 185, 57 L. Ed. 431 (1913), this Court stated that:

> The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm. v. Baird*, 194 U.S. 25 [48 L. Ed. 860, 24 S. Ct. 563 (1904)]. *But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended.* In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. *All parties must* be fully apprised of the evidence submitted or to be considered, and must *be given opportunity to cross-examine witnesses,* to inspect documents and to offer evidence in explanation of rebuttal. *In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding;* . . . .

(emphasis added).

The procedures outlined in the *I.C.C. v. Louisville* case demonstrate the procedures required to be afforded to a party in "proceedings designed to adjudicate disputed facts in particular cases." *United States v. Florida E. Coast R. Co.*, 410 U.S. 224, 245, 35 L. Ed. 2d 223, 93 S. Ct. 810 (1973). As was explained previously, the hearing in this case concerned adjudicative facts. In its decision in this case, the North Dakota Supreme Court failed to recognize that an administrative agency considering adjudicative facts must afford a claimant the procedures outlined in *I.C.C. v. Louisville, supra.* As a result, parties appearing before North Dakota administrative agencies in the future will be denied the constitutional right to due process of law.

Numerous courts have determined that due process is not afforded to a party before an administrative agency

when the agency denies that party an opportunity to cross-examine a person whose report, discussing the issues addressed at the hearing, is placed into evidence before the administrative agency. *See, e.g., Employers Commercial Union Ins. Group v. Schoen,* 519 P.2d 819 (Alaska 1974); *Northwest Trailer Sales v. McCann,* 217 So. 2d 310 (Fla. 1968); *Beckler v. Central Foundry Div.,* 32 Mich. App. 661, 189 N.W.2d 64 (1971); *Puncel v. City and County of Denver,* 475 P.2d 359 (Colo. App. 1970); *Fremont Indem. v. Workers' Comp. Appeals Bd.,* 153 Cal. App. 3d 965, 200 Cal. Rptr. 762 (Cal. App. 2 Dist. 1984); *Tufariello v. Barry,* 60 A.D.2d 813, 401 N.Y.S.2d 210 (1978); *Jones v. Industrial Commission,* 401 P.2d 172 (Az. App. 1965) (also holding that the party entitled to cross-examination cannot be forced to bear the cost of exercising that right); *Southern Stevedoring Co. v. Voris,* 190 F.2d 275 (5th Cir. 1951); *McCarthy Stevedoring Corp. v. Norton,* 40 F. Supp. 957 (E.D. Pa. 1939) (quoting *I.C.C. v. Louisville & Nashville R. Co., supra,* and stating that that case indicates that the party entitled to cross-examination cannot be compelled to expend money in order to obtain that opportunity). Thus, the decision of the North Dakota Supreme Court stands alone. It serves to deprive all parties involved in hearings before North Dakota administrative agencies of their right to due process.

It must be noted that the instant case is distinguishable from this Court's decision in *Richardson v. Perales,* 402 U.S. 389, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1970). In *Richardson,* a claimant seeking disability benefits from the Social Security Administration challenged the denial of benefits by alleging, in part, that he was denied procedural due process when the agency considered medical reports when the makers of those

reports were not available at the hearing for cross-examination. This Court found no due process violation because the claimant "did not take advantage of the opportunity afforded him under 20 C.F.R. § 404.926 to request subpoenas for the physicians." However, the Social Security Administration is obligated to pay the costs of producing those witnesses when subpoenas are requested. *See* 20 C.F.R. § 404.916(b)(1) and § 404.950(d)(3) and (4) (1988). In the instant case, Howes' counsel repeatedly asked for, and was refused, the right to cross-examine the Bureau's witnesses.

The decision of the North Dakota Supreme Court serves to deprive all parties before administrative agencies in North Dakota of their right to due process of law. Review of this decision by the Court is necessary to rectify this serious injustice.

II.

The North Dakota Supreme Court's decision, that when a party has a hearing before an administrative agency that party's right to procedural due process with regard to cross-examination consists only of the statutory procedures regarding the production of persons for the purposes of cross-examination, deprives claimants seeking relief before North Dakota administrative agencies of the constitutional right to due process of law and is in direct conflict with prior decisions of this Court.

In considering whether the procedure followed by the Bureau in denying Howes the right to cross-examine witnesses violated a party's right to due process of law before an administrative agency, the North Dakota Supreme Court abdicated its duty to determine what

process was due Howes, determining that it was the prerogative of the legislative branch to determine what process should be afforded to a party before an administrative agency. Such an erroneous determination affects all parties before administrative agencies in North Dakota and deserves this Court's attention.

In determining that the Bureau's denial of an opportunity for cross-examination, unless Howes paid for the opportunity himself, did not deprive Howes of his right to due process, the North Dakota Supreme Court stated:

> The fundamental requirements of due process are notice of contemplated action and the opportunity to be heard. . . . A fair hearing includes the opportunity to confront and cross-examine adverse witnesses. *Which party bears the expense associated with the right of confrontation requires a balancing of the interests involved. Such a determination is best made by the Legislature.*

429 N.W.2d at 737-38 (citations and footnotes omitted).

The North Dakota Supreme Court concluded that *the legislature* had required a party before an administrative agency to bear the cost of producing witnesses adverse to him in order to cross-examine them; thus there was no violation of Howes' right to due process. Such a decision is in direct conflict with this Court's decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).

In *Loudermill*, this Court clearly rejected the "bitter with the sweet" approach to due process – the idea that if a state statute created an entitlement, the only procedures to be accorded at the deprivation of that entitlement are those provided for by the state's statutes. Instead, this

Court stated that "[t]he right to due process 'is conferred, not by legislative grace, but by constitutional guarantee'"; and, therefore, the determination of what process is due must be made by looking to the constitution, not to state statutes. 470 U.S. at 540-41, citing *Arnett v. Kennedy*, 416 U.S. 134, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974) (Powell, J. concurring in part and concurring in result in part).

The North Dakota Supreme Court determined that, North Dakota's statutes imposed the costs of producing adverse witnesses on a party in an administrative hearing; therefore, an agency's actions in doing so could not violate the party's right to due process of law. This erroneous determination, as applied throughout the course of administrative agency proceedings in North Dakota, deprives all claimants of their right to due process of law by denying them the right of cross-examination as was discussed in section I. Such an extensive denial of the right to due process of law deserves this Court's attention.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

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APPENDIX

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James C. Howes, Appellant

v.

North Dakota Workers Compensation Bureau, Respondent and Appellee

and

Leingang Steel Siding, Respondent

Civil No. 880036

(Filed Sept. 20, 1988)

Appeal from the District Court of Morton County, South Central Judicial District, the Honorable William F. Hodny, Judge.

AFFIRMED.

Opinion of the Court by Erickstad, Chief Justice.

Dietz & Little, Gateway Office Building, 2718 Gateway Avenue, #102, Bismarck, ND 58501, for appellant; argued by Stephen D. Little. Appearance by Kathryn L. Dietz.

Hugh P. Seaworth (argued), Assistant Attorney General, North Dakota Workers Compensation Bureau, Highway 83 North, 4007 Russel Building, Bismarck, ND 58505, for respondent and appellee.

Howes v. North Dakota Workers Compensation Bureau

Civil No. 880036

ERICKSTAD, Chief Justice.

James C. Howes appeals from a district court judgment affirming an order of the North Dakota Workers Compensation Bureau. We affirm.

James Howes was injured on July 10, 1985, when he struck his head on an overhanging steel bar of a horse trailer owned by his employer, Leingang Steel Siding, Inc., of Mandan, North Dakota. Howes was able to finish work after hitting his head, but later became sick and was admitted to the emergency room of a Bismarck, North Dakota, hospital. Howes was hospitalized for five days and was diagnosed as having suffered a craniocerebral trauma.

The Bureau accepted liability in Howes' case, paying medical expenses and disability benefits from July 7, 1985, through July 21, 1985. Howes returned to work on July 22, 1985. However, in March of 1986 Howes was released from his employment. Howes attributed his release to a memory loss which he believed was caused by the accident. The Bureau called Howes' employer who apparently indicated Howes was released because of a "poor work attitude/performance."

Howes testified that he experienced mild headaches several times a week and severe headaches "maybe two times a month" after the July 1985 accident. On March 12, 1986, Howes sought medical treatment from Dr. John S. Pate complaining of what the report denominated a syncopal[1] episode. On March 20, 1986, Dr. Pate again examined Howes to follow up on his complaints. In a medical statement sent to the Job Insurance Claims Office dated that same day, Dr. Pate suggested Howes may be having

seizures and advised that it would not be wise for him to work.[2]

On April 26, 1986, Howes experienced a severe headache. Howes was admitted to the hospital and remained there for approximately twenty-one days. Howes sought payment from the Bureau for the medical expenses connected with his second (April 1986) hospitalization.

The Bureau denied liability for the April 1986 hospitalization. The pertinent parts of the Bureau's findings set forth in an "Order Denying Further Benefits" dated October 6, 1986 follow:

"III.

"Claimant alleges he sustained a head injury when he hit his head on a bar as he came out of a horse trailer on July 10, 1985.

"IV.

"Claimant's condition was diagnosed as a craniocerebral trauma.

"V.

"The Bureau accepted liability in this case, paid medical expenses, and paid disability benefits from July 7, 1985, through July 21, 1985.

"VI.

"Claimant returned to work on July 22, 1985.

"VII.

"On March 20, 1986, claimant's physician indicated that the claimant may be having seizures and it would be wise for him not to work.

"VIII.

"A medical report dated March 20, 1986, states that the claimant had a head injury in 1981, with symptoms similar to his current symptoms.

"IX.

"The claimant was hospitalized from April 26, 1986, through May 14, 1986, for severe headaches. He underwent psychological testing and evaluations and it was reported that he had no problems with his memory.

"X.

"Claimant's physician indicated that he believed a great deal of the claimant's headaches were related to tension.

"XI.

"Claimant's medical history indicated that he had been having syncopal episodes prior to an automobile accident in October, 1980. The syncopal episodes went away after the claimant started medication.

"XII.

"The greater weight of the evidence indicates that the claimant's current condition is not in any way related to his employment injury on July 10, 1985.

"CONCLUSIONS OF LAW

* * * *

"II.

"The claimant has failed to prove that he is entitled to further benefits under the North Dakota Workmen's Compensation Act over and above those previously awarded and paid."

Howes requested and was granted a rehearing before the Bureau. After the Bureau heard testimony from Howes, it affirmed its decision denying further benefits:

"The greater weight of the evidence, including testimony adduced at the formal hearing and medical reports in connection with claimant's medical assessment, indicated that the claimant's continued complaints and hospitalization are not the result of the July 10, 1985, incident in the horse trailer."

Howes appealed the Bureau's decision to the district court, which affirmed the Bureau's decision. On appeal to the district court and this Court Howes raises the following three issues:

"I. THE BUREAU HAD A RESPONSIBILITY TO DEVELOP THE EVIDENCE FURTHER IN THIS CLAIM FOR MEDICAL BENEFITS IN ORDER TO ASCERTAIN THE SUBSTANTIAL RIGHTS OF THE PARTIES.

"II. THE BUREAU FAILED TO CLARIFY INCONSISTENT MEDICAL EVIDENCE.

"III. THE BUREAU'S PROCEDURES DEPRIVED HOWES OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS."

I.

The essence of Howes' first contention is that the Bureau has the evidentiary burden of proving that Howes' 1986 headaches and hospitalization are unrelated to his July 1985 head injury, rather than Howes having the burden of proving that his July 1985 head injury *is* related to his April 1986 headaches and hospitalization. Howes contends "[t]here is simply no authority for the Bureau's position" that Howes has the burden of proof with respect to connecting the July 1985 head injury to his April 1986 headaches. We disagree.

Section 65-01-11, N.D.C.C., unequivocally states that the claimant "shall have the burden of proving by a preponderance of the evidence that he is entitled to participate" in the fund. Our decisions have consistently recognized that the claimant must show that an "ensuing disability is causally connected to the employment injury." *Inglis v. North Dakota Workmen's Compensation Bureau*, 312 N.W.2d 318, 322 (N.D. 1981); *Claim of Bromley*, 304 N.W.2d 412, 415 (N.D. 1981), *citing Kuntz v. North Dakota Workmen's Compensation Bureau*, 139 N.W.2d 525 (N.D. 1966).

Following Howes' July 1985 head injury, the Bureau accepted liability for medical expenses and disability benefits. Howes returned to work in July of 1985 and did not contact the Bureau for further benefits until after his

headaches and hospitalization in April of 1986. Howes insists that he "proved" his case in July of 1985 and wonders "[h]ow many times must he prove his case?" We addressed the subject of Howes' question recently in *Hayes v. North Dakota Workers Compensation Bureau*, 425 N.W.2d 356, 357 (N.D. 1988): "If the Bureau terminates benefits, after initially accepting a claim and paying benefits, the claimant has the burden of proving his or her right to continue receiving benefits." *See also Gramling v. North Dakota Workmen's Compensation Bureau*, 303 N.W.2d 323, 325-26 (N.D. 1981).

II

Howes next contends the Bureau failed to clarify inconsistent medical evidence, and "chose to ignore" Howes' testimony which tended to prove that the April 1986 headache and hospitalization were causally connected to the July 1985 head injury. Howes further contends the Bureau "chose to ignore" a March 1986 statement of Dr. Pate which indicated Howes was experiencing a concussion with blackout spells and impaired memory.[3]

Our decisions have recognized that the adversarial concept has only limited application in determinations related to workers compensation claims. We have recently said that the Bureau is "obligated to consider the entire medical record, and if there is conflicting medical evidence, some favorable and some unfavorable to the claimant, the Bureau must adequately explain its reason for disregarding the favorable evidence in denying benefits." *Hayes, supra* at 357; *see also Weber v. North Dakota Workmen's Compensation Bureau*, 377 N.W.2d 571, 574

(N.D. 1985) (Bureau did not "adequately address" medical evidence which did not support its findings).

Initially our rule requiring the Bureau to make reasonable efforts to clarify discrepancies in medical evidence arose out of a situation wherein the attending physician's report contained the discrepancy. *See Claim of Bromley, supra* at 417.[4] In a case following *Bromley* involving the issue of discrepancies in the medical evidence, the discrepancies were contained within different reports from the same doctor. *See Roberts v. North Dakota Workmen's Compensation Bureau,* 326 N.W.2d 702, 706 (N.D. 1982). In *Roberts,* the examining physician made two different statements in two different documents about the cause of the claimant's disability. A statement in the first report partially conflicted with a statement in the latter report.

Roberts thus slightly expanded the principle in *Bromley* to require the Bureau to clarify conflicting evidence from the same individual who provided conflicting evidence in two different written reports. We concluded it is "inappropriate for the Bureau to rely only upon that part of an inconsistent medical report which is favorable to the Bureau's position without attempting to clarify the inconsistency." *Roberts, supra* at 706.

More recently in *Weber, supra* at 574, the Bureau was presented with conflicting evidence between two different orthopedic surgeons about the amount of time it would take the claimant to recover from his work related injury. Relying on *Bromley,* we remanded the case in *Weber* to "clarify the discrepancies." *Weber, supra* at 574.

Bromley has apparently been expanded to require the Bureau to attempt to clarify conflicting medical evidence from different physicians. Notwithstanding this expansion we must keep in mind the basic rule which was stated in *Bromley* by Justice Sand who first enuciated our medical evidence discrepancy rule:

> "Normally, it is within the province of the administrative agency, not the courts, to weigh conflicting medical opinions and to resolve these conflicts. *Hassler v. Weinberger,* 502 F.2d 172 (7th Cir. 1974)." *Bromley, supra* at 417.

We must also keep in mind that pursuant to section 28-32-19, N.D.C.C., we must affirm the Bureau's decision unless its findings of fact are not supported by a preponderance of the evidence or its conclusions are not supported by its findings of fact. *Hayes, supra* at 356-57, *citing Gramling, supra.* In determining whether or not an agency's findings of fact are supported by a preponderance of the evidence we do not make independent findings of fact or substitute our judgment for that of the agency, but we determine only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence. *Power Fuels, Inc. v. Elkin,* 283 N.W.2d 214 (N.D. 1979). We believe the Bureau's conclusions are supported by a preponderance of the evidence and that the bureau has adequately addressed conflicting evidence.

Howes was examined by Dr. Pate prior to the April 1986 hospitalization. Pate's assessment, noted in the medical records from that period, indicates a possible concussion disorder.[5] Pate recommended treating Howes' blackout episodes with medication or otherwise seeing

Donald M. Larson, M.D., a neurologist, for additional evaluation of the problem. Dr. Larson was consulted during the April 1986 hospitalization.

Howes again saw Dr. Larson when he underwent a "complete medical assessment" which included "psychological, psychiatric, neurologic, physical therapy, occupational therapy, social service and orthopedic evaluations" during March 1987. Howes also had an ophthalmological evaluation in March of 1987.

Howes' neurologic exam was "normal" and the examining physician, Dr. Larson, concluded that Howes' "problems with tension and nervousness . . . [have] a considerable bearing on his headaches." D.E. Townes, M.D., found "no ocular explanation for headache and no evidence for any residium from prior traumatic episode."

Dr. Greg S. Peterson, M.D., also examined Howes and concluded:

> "Mr. Howes has had a long history of nonspecific 'spells' of unknown etiology. His headaches do not appear to be related to his 7-10-85 work related head trauma. There is no evidence of memory loss and the patient's reports of retrograde memory loss are not at all characteristic of patients with head trauma. The headaches that prompted admission to the hospital in April of 1986 would not appear to have any direct relationship to his work related injury. There was no evidence of disability on our evaluation."

Weighing this evidence along with evidence of Howes' prior medical history against Howes' testimony that his April 1986 headache and hospitalization were related to the July 1985 head injury, we believe a reasoning mind could have reasonable concluded that Howes

failed to show a causal connection between his July 1985 head injury and his April 1986 headaches.

III

Howes' final contention is that the Bureau's formal hearing process deprives him of due process guaranteed by the state and federal constitutions.

Howes wrote the bureau asking "[i]f the Bureau intends to rely upon evidence not presented at the pending formal hearing, please provide me with a copy of such evidence and please consider this a request to cross-examine the person[s] furnishing such evidence, pursuant to Section 28-32-07, N.D.C.C." While the Bureau responded that it would "rely on the entire record," Howes apparently anticipated that the Bureau would base its determination, at least in part, on medical reports written by Dr. Larson, and asked the Bureau to depose him. Counsel for the Bureau wrote a letter to Larson and asked whether or not his medical opinion could be determined by answering some written questions relating to Howes' case. By letter the Bureau submitted questions to Larson and Larson responded in a written report. The Bureau apparently made Larson's answers available to Howes pursuant to section 28-32-07, N.D.C.C., which reads in relevant part:

> "28-32-07. *Consideration of information not presented at a formal hearing.* - If an administrative agency desires to avail itself of competent and relevant information or evidence in its possession or furnished by members of its staff, or secured from any person in the course of an independent investigation conducted by such agency, in addition to the evidence presented at any formal hearing, it may do so after

> first transmitting a copy of such information or evidence or an abstract thereof to each party of record in the proceeding, and after affording each such party, upon written request, an opportunity to examine such information or evidence and to present evidence in connection therewith and to cross-examine the person furnishing such information at a further public hearing to be called and held upon at least ten days' notice given by registered or certified mail. Nothing contained in this section prevents any administrative agency from taking notice of any fact or facts set forth in its duly adopted rules or any facts which are judicially noticed by the courts of this state."

Howes contends that as the Bureau used this medical evidence, the Bureau should have afforded Howes the opportunity to cross-examine Dr. Larson either by deposition or at the formal hearing and that the cost of the cross-examination should have been borne by the Bureau. After submitting the questions to Dr. Larson, however, counsel for the Bureau notified Howes that in the past Larson had been reluctant to participate in depositions and doubted he would be more willing to help here. Dr. Larson suggested by letter to the Bureau's counsel that an evaluation by another MedCenter One physician might be the best way to obtain a comprehensive view of Howes' problem. In response to this suggestion, and in light of Dr. Larson's past reluctance to being deposed, the Bureau arranged for the more complete medical assessment which was later accomplished and is earlier referred to herein.

We believe section 28-32-07, N.D.C.C., clearly grants Howes, upon written request, the right to cross-examine the physician at a "further public hearing." However,

section 28-32-07, N.D.C.C., does not require the Bureau to pay for the costs of the cross-examination. Who must bear those costs is addressed in section 28-32-09, N.D.C.C., which reads in relevant part:

> *"28-32-09. Subpoena and attendance of witnesses. . . .* The deposition of a witness or party in any proceeding before an agency may be taken in the same manner and on the same notice as in a civil action pending in the district court. Interrogatories may be sent to any witness or party in any proceeding in the same manner and on the same notice as in an action pending in the district court. A party, other than the administrative agency, must first show good cause before undertaking discovery proceedings, including interrogatories. Any witness who is subpoenaed under the provisions of this section and who appears at the hearing, or whose deposition is taken, shall receive the same fees and mileage as a witness in a civil case in the district court, *and such fees shall be paid by the party or agency at whose instance the witness appears or his deposition is taken".* [Emphasis added.]

It is within the Bureau's discretion to approve the taking of depositions to be paid for by the bureau, and each case must be judged on its merits. *Hayes, supra* at 358; *Steele v North Dakota Workmen's Compensation Bureau,* 273 N.W.2d 692, 702 (N.D. 1978). In this case the Bureau concluded that the physician's opinion could be obtained "informally" by a written report.

The general rule in workers compensation law is that each party pays his or her own attorney and costs unless a statute specifically provides otherwise. *Gross v. Great A. & P. Tea Co.,* 274 N.W.2d 817, 818 (Mich. App. 1979); 3 Larson's Workmen's Compensation Law § 83.20, p. 15-695. Section 65-02-08, N.D.C.C., provides that the Bureau shall pay a claimant's attorney fees incurred "in

proceedings before the bureau. . . ." *Moore v. North Dakota Workmen's Comp. Bureau*, 374 N.W.2d 71, 74 (N.D. 1985). Section 65-10-03, N.D.C.C., provides in pertinent part:

> "The cost of the appeal and an attorney's fee for the appellant's attorney shall be set by the appellate court and taxed against the bureau unless the appeal is determined to be frivolous. The bureau shall pay such attorney's fee from the bureau general fund. The amount of such attorney's fee shall be determined in the same manner as prescribed by the bureau for attorney fees, and the amount of attorney's fee already allowed in proceedings before the bureau shall be taken into consideration."

The North Dakota Legislature, therefore, specifically requires the Bureau to pay the claimant's attorney's fees and costs on appeal. The costs of taking depositions and subpoenaing expert witnesses for cross-examination, being not a part of the "appeal" process, are not set by the appellate court but are governed by section 28-23-09, N.D.C.C.

Statutes in other jurisdictions have been construed to require the Bureau to pay the claimant's attorney's fees as well as expert witness fees. *See Moore v. General Motors Corp., Terex Div.*, 18 Ohio St.3d 259, 480 N.E.2d 1101 (1985) (relying on statute to allow recovery of fees for expert preparing for and giving deposition); *Schauder v. Brager*, 303 Md. 140, 492 A.2d 630 (1985) (Workers Compensation Commission has power under statute to approve and modify experts' fees); *Cf. Rosenbaum v. Industrial Commission*, 93 Ill.2d 381, 67 Ill. Dec. 83, 444 N.E.2d 122 (1983) (statute indicates that the Commission has discretion in deposing experts, and where claimant refused to subpoena because of cost, not an abuse of

discretion to refuse to issue dedimus potestatem to secure testimony of claimant's treating physicians).

Section 1-02-02, N.D.C.C., states that "[w]ords used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. . . ." We understand the phrase "attorney's fee" as used in sections 65-02-08 and 65-10-03, N.D.C.C., to mean expenses incurred for the services of an attorney. Section 28-32-09, N.D.C.C., places the expense of witness fees on the party who calls the witness. Therefore, we conclude the Bureau did not abuse its discretion in refusing to pay the cost of deposing Dr. Larson.

Further, we are not convinced the Bureau's "practice" of securing medical statements such as Dr. Larson's opinion deprived Howes of due process under the federal and state constitutions. We discussed the parameters of due process in the context of an administrative proceeding in *First American Bank & Trust Company v. Ellwein*, 221 N.W.2d 509, 514 (N.D. 1974), *cert. denied*, 419 U.S. 1026, 95 S.Ct. 505, 42 L.Ed.2d 301, *reh'g denied*, 419 U.S. 1117, 95 S.Ct. 798, 42 L.Ed.2d 816 (1975):

> "What constitutes due process within an administrative proceeding? While recognizing that the adjudicative function of the Board is quasi-judicial in nature, we have never held that the minimal due process that must be afforded participants before an administrative board or agency is synonymous with minimal requirements of due process in a court of law. To do so would be to create a second judicial branch without statutory authority and add to time required in the disposition of administrative decisions." 221 N.W.2d at 514.

More recently in *Berger v. State Highway Commissioner*, 394 N.W.2d 678, 681 (N.D. 1986), we said that a person before an administrative agency cannot demand due process equivalent to that followed in courts, but that a person is entitled to procedural fairness in an administrative hearing.[6]

The fundamental requirements of due process are notice of contemplated action and the opportunity to be heard.[7] *Beckler v. North Dakota Workers Compensation Bureau*, 418 N.W.2d 770, 773 (N.D. 1988) *citing Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (continuing right to welfare benefits is an entitlement equivalent to a property interest within meaning of Due Process Clause of Fourteenth Amendment of the United States Constitution). A fair hearing includes the opportunity to confront and cross-examine adverse witnesses.[8] Which party bears the expense associated with the right of confrontation requires a balancing of the interests involved.[9] Such a determination is best made by the Legislature.[10]

Howes requested and the Bureau granted a full evidentiary hearing to determine the correctness of its decision to terminate Howes' benefits. Howes was given an opportunity to be heard. Howes also had the opportunity to cross-examine Dr. Larson, albeit at Howes' expense, through the use of a deposition or subpoena to appear at a formal hearing. Section 28-32-09, N.D.C.C. Accordingly, we conclude that neither Howes' state nor federal constitutional due process rights were violated.

For the reasons stated herein, the judgment affirming the Bureau's decision is affirmed.[11]

/s/ Ralph J. Erickstad, C.J.
/s/ H.F. Gierke, III
/s/ Gerald W. VandeWall

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[1] Syncopal episodes involve fainting and other temporary losses of consciousness due to lack of oxygen to the brain. 3A *Lawyers' Medical Cyclopedia,* § 23.13 (3d ed. 1983).

[2]Medical Statement follows:

"Medical Statement

"NAME *James C. Howes* SSA No. *522-78-8217*

"TO THE PHYSICIAN:

"We shall appreciate you certification of the results of your examination, as the examining physician of this individual, in answer to the questions below:

"1. Nature of illness or disability (lay terms) *concussion with black-out spells and impaired memory.*

"2. Patient under my care from *3/5/86* to *present.*

"3. Date illness or disability occurred *July '85.*

"4. Date last examined *3/20/86.*

"5. If condition due to pregnancy –

a. What is the expected date of confinement? *No.*

b. What was the date of childbirth? *No.*

"6. Did you advise patient to quit his/her last job because of illness, disability or pregnancy? *No.*

"7. Has patient been unable to work at any time due to illness, disability or pregnancy? *Yes.*

"If 'Yes,' give dates: From *3/3/86* To *present*.

"8. Has patient been released as able to resume full-time work? *No*

"If 'Yes,' on what date? ___

"9. If patient must now limit the kind, days or hours per week, or place of work because of his/her health, please explain limitation: *James Howes may be having seizures at this time and it would not be wise for him to work.*

"*3/20/86* (Date)

s/s J. Pate, M.D.
(Signature of Physician)

515 E. Broadway
(Address)

Bismarck, ND 58501
(City, State, Zip Code)

"*CLAIMANT'S RELEASE*

"I herewith consent to the release of the above information to the North Dakota Employment Security Bureau with the understanding that it is for the confidential use of that agency in determining my eligibility for unemployment insurance benefits.

_____
Claimant's Signature

"RETURN TO:

"JOB INSURANCE CLAIMS OFFICE
BOX 609
MANDAN, ND 58554
(Local Office Address)"

3 *See supra* note 2 for text of the medical statement.

4 In *Bromley* we stated:

"In this instance the Bureau based its decision upon the part of the report by Dr. Ching supporting its

> decision but discounted the part of the same report which was inconsistent with its decision without any attempt to obtain a clarification of the discrepancy. This report, as well as the other reports made by Dr. Ching, were received by the Bureau before it made its initial dismissal order. The Bureau could not help notice these discrepancies and should have made reasonable efforts to have them clarified." *Bromley*, 304 N.W.2d at 417.

[5] The Job Insurance claim form filed by Dr. Pate refers back to July 1985 as the date the disability occurred. *See supra* note 2 for the full text of this medical statement.

[6] The decisions of the federal courts indicate that a full judicial hearing in conjunction with administrative proceedings has been required only if the interest at stake is protected by due process and if adjudicative facts are in dispute. 2 Davis, Administrative Law Treatise § 12.10 (2d ed. 1979).

[7] In an article written by the late Judge Henry J. Friendly as recently as 1975, Mr. Justice White was quoted as stating, "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests." *See Some Kind of Hearing*, 123 U Pa.L.Rev. 1267 (1975) (hereinafter *Hearing*) (quoting from *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974)).

Judge Friendly, in discussing further due process requirements and the right of participants before an administrative board or agency to cross-examine witnesses, said that the Administrative Procedure Act (APA) enacted in 1946, prescribed trial-type procedures only "when rules are required by statute to be made on the record after opportunity for an agency hearing." 5 U.S.C. § 553(c) (1970). He continued:

> "When the question of the scope of this exception finally reached the Supreme Court in *United States v. Allegheny-Ludlum Steel Corp.* [406 U.S. 742, 757 (1972)] and *United States v. Florida East Coast Railway*

> *Co.* [410 U.S. 224, 239 (1973)], not only was the exception given a narrow construction but the opinions (particularly the one in *Florida East Coast)* opened wide and unexpected vistas for the use of less than full trial-type hearing procedures in business and social regulation." *Hearing, supra* at 1272-73.

[8] In pointing out that the right of confrontation is the most debated issue in conjunction with executive and adminstrative proceedings, Judge Friendly noted:

> "Since the only provision in the Bill of Rights conferring the right of confrontation is limited to criminal cases, one might think the constitutional right of cross-examination was similarly confined. However, in *Greene v. McElroy* [360 U.S. 474, 497 (1959)] Chief Justice Warren said that the Court had applied this principle 'in all types of cases where administrative and regulatory actions were under scrutiny.' " *Hearing, supra* note 7, at 1283.

In *Goldberg v. Kelly,* 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287, 299 (1970), the Supreme Court addressed the constitutional issue with respect to executive and administrative proceedings and held that due process requires timely and adequate notice and an effective opportunity to defend by confronting any adverse witnesses and by presenting arguments and evidence orally.

However, Judge Friendly noted that:

> "The absolutes of *Greene v. McElroy* [360 U.S. 474, 496-97 (1959)] and of *Goldberg v. Kelly* [397 U.S. 254, 269-70 (1970)] with respect to confrontation arguable have now been ended by *Wolff v. McDonnell* [418 U.S. 539 (1974)]. There the Court considered whether a prisoner faced with the loss of up to eighteen months in 'good time' credits had a constitutional right to confront and cross-examine adverse witnesses. It concluded that, in the special circumstances of the prison, interest-balancing would dictate a right to

> cross-examination only in a most limited range of cases. In other situations, whether to allow cross-examination was left to the 'sound discretion' of the prison authorities." [Citations omitted.] *Hearing, supra* at 1285-86.

Judge Friendly further noted that "the *Wolff* decision, as well as the case-by-case approach of *Gagnon v. Scarpelli* [411 U.S. 778, 787-91 (1973)] on revocation of probation, are likely to have considerable anti-*Goldberg* reverberations." *See Hearing, supra* note 7, at 1288-89.

[9]Judge Friendly suggests:

> "It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving." *Hearing, supra* note 7, at 1276.

[10] Courts are good at deciding cases, bad at drafting legislation; typically they see the case at hand and a few others but not the entire spectrum. *Hearing, supra* note 7, at 1302.

[11] In light of the length, content, tenor and intensity of the dissent some response seems appropriate if not required.

The essence of the dissent seems to be that as the Bureau relies upon Dr. Larson's report and responses to written questions posed by the Bureau, Howes is entitled to cross-examine Dr. Larson at the Bureau's expense to test the truth of his testimony. Actually, however, Howes has the burden of proving he is entitled to benefits pursuant to § 65-01-11, N.D.C.C. See discussion in opinion. Dr. Larson was Howes' own doctor and was not sought out by the Bureau as its own expert to meet Howes' expert testimony.

Incidentally, if we were to require the Bureau to pay for subpoena costs, not only might this further deplete scarce and diminishing funds, but it would also likely introduce a delaying factor into an increasingly complex process and produce or increase a backlog in Workers Compensation cases. These latter consequences point to a need for legislative attention rather than for judicial legislation.

Howes v. North Dakota Workers Compensation Bureau

Civil No. 880036

Meschke, Justice, dissenting.

I respectfully dissent. Howes was effectively denied opportunity to cross-examine adverse medical experts and did not receive a fair hearing.

James Howes worked in the warehouse for Leingang Steel Siding in Mandan. On July 10, 1985, shortly before 5:00 P.M., he was loading windows into a horse trailer. As he hurried out of the trailer, he struck his head on a bar across the back of the trailer. Dr. Larson, who saw him the next day, described his injury:

> "He was not rendered unconscious but he did see stars and apparently took a fairly good blow to the head. He then started having headaches which became progressively worse. He started vomiting about 10 p.m. and then came into the emergency room and was admitted. He had noted some blurred vision last night. He noted increased headache pain by coughing or sneezing."

Dr. Larson diagnosed "craniocerebral trauma." Howes was released from the hospital on July 15 and returned to work on July 22. The Workers Compensation Bureau paid

his medical bills and paid him disability benefits for July 11 through July 21, 1985.

Leingang discharged Howes from employment on March 3, 1986. Leingang later reported to the Bureau that he was "released for poor work attitude/performance. Would not keep at his work. Work performance was not significantly different from pre-injury performance vs post-injury."

Howes went to Dr. Pate of the Family Practice Center on March 12, 1986. Dr. Pate reported to the Bureau on March 20, 1986:

> "Concussion with blackout spells and impaired memory.
>
> "* * * * *
>
> "July, 1985
>
> "* * * * *
>
> "James Howes may be having seizures at this time and it would not be wise for him to work."

On April 26, 1986, Howes was hospitalized for headaches and dizziness with vomiting on April 25. Family Practice Center physicians again referred him to Dr. Larson. Upon his release from the hospital on May 14, 1986, Dr. Larson equivocated in his report to the Bureau:

> "After admission, he was followed by the FPC physicians and I was asked to see him in consultation. Felt there may be some vascular component initially and he was placed on Inderal therapy but no changes in his headaches at all. He did have a number of psychological tests and evaluations done and they found no problems with his memory. Overally, [sic] his headaches persisted. He was tried on a great number of therapies including Inderal, biofeedback, steroids,

> and lastly some Sansert. There was improvement in headache toward the end, but still had some problems. Felt that a great deal of the headaches are related to tension. Although some of the headaches have some vascular components to them. He was discharged on Sansert 2 mg b.i.d., Elavil 25 mg t.i.d. and some Tylenol #3 to be used every 6 hours PRN for severe headaches. He will be followed in the clinic again in 4 weeks."

On October 6, 1986, the Bureau denied Howe's claim for the March-May 1986 medical expenses. Picking out references in his medical records to a childhood fall at the age of 6 and to his "having syncopal episodes prior to an automobile accident in October, 1980," the Bureau concluded that "the greater weight of the evidence indicates that the claimant's current condition is not in any way related to his employment injury on July 10, 1985."

Howes requested a hearing and sought a deposition of Dr. Larson. Instead, the Bureau wrote Dr. Larson with questions:

> "Given Mr. Howes' medical history, complaints and examination results, do you have an opinion as to whether the headaches he presently complains of are 'more likely that [sic] not', or 'probably' caused by the July 10, 1985 horse trailer incident (hit top of head on crossbar)? If so, what is your opinion?
>
> "Is it just as likely that Mr. Howes' headache complaints are related to some other factor such as some other trauma? seizure disorder? muscle spasm? or even smoking allergy? Please explain if you can. Is there anything else you can add that might help?"

The Bureau also advised Howe's counsel:

> "Dr. Larson has, in the past, expressed reluctance to participate in a deposition. I hope he is more willing to help here, but I doubt it."

A few days later, without responding to the questions, Dr. Larson suggested:

> " . . . an evaluation by Doctor Saxvik at Medcenter One may be the best way to obtain a comprehensive view of Mr. Howes' problem."

In late March 1987, the Bureau arranged for Howes to enter Medcenter One as an inpatient for four days of "complete medical assessment," including "psychological, psychiatric, neurologic, physical therapy, occupational therapy, social service, and orthopedic evaluations as necessary." Medcenter One reported to the Bureau on April 8, 1987.

Social Worker Scott D. Boehm concluded that "[t]here does not appear to be any glaring significant psychosocial problem which is interferring with his rehabilitation process." Jeff Lange, Rehabilitation Physical Therapist, concluded that "[d]ue to the fact that this patient states that his headache is generally around a 1-2, and that his severe headaches come only 1-2 times a month, I do not feel that this would significantly interfere with any employment." Dick Elefson, MAC, had no specific recommendations and "deferred" his diagnostic impression. Dr. Townes reported a "normal eye examination. I can find no ocular explanation for headache and no evidence for any residium from prior traumatic episode." Dr. Lampman's assessment was:

> "Mild continuous frontal vertical headaches with occasional exacerbations, probably not limiting his occupation. This man did have a report of trauma to the head, but never had a concussion. Therefore this cannot be classified as a postconcussive syndrome. All we have to go on is his description of headache and his occasional requirement for Tylenol with

Codeine to relieve flares. As I see it, not much more can be said at this point from a clinical standpoint."

Dr. Larson was again consulted and once more hedged in his report to the assessment team:

"This is a gentleman that presents with some episodes of spells dating back to age 14. Was on Phenobarbitol therapy for a period of time, however, all the EEGs have been normal. He has had several blows to the head, one in an auto accident in October of 1980 and then in 1985 struck his head on a bar across a horse trailer, but not rendered unconscious in that. He continues to complain of headaches and and is unresponsive to most forms of therapy.

"Psychological testing in the past have shown some problems with tension and nervousness and feel that this has a considerable bearing on his headaches. I could find no other specific organic reason for the headaches. CT scan of the head and brain done here last few days again is normal. His usage of medicine at the present time is down to practical nothing, taking he indicates about five Tylenol per month. With some of the more severe headaches, may use a few occasional Tylenol #3, but again the headaches do not seem to be troublesome in that he had been able to work and hold a job then."

Dr. Greg S. Peterson, Medical Director for Medcenter One Rehabilitation, summarized:

"Mr. Howes has had a long history of nonspecific 'spells' of unknown etiology. His headaches do not appear to be related to his 7-10-85 work related head trauma. There is no evidence of memory loss and the patent's reports of retrograde memory loss are not at all characteristic of patients with head trauma. The headaches that promoted admission to the hospital in April of 1986 would not appear to have any direct relationship to his work related injury. There was no evidence of disability on our evaluation."

Dr. Peterson concluded:

> "(1) Release to work without restrictions.
>
> "(2) Workmen's Compensation does not appear to be responsible for payment for the hospitalization in April of 1986 for evaluation of headaches.
>
> "(3) It does not appear that Workmen's Compensation should be responsible for any future medical bills for headaches unless a new work related head injury occurs."

The Bureau scheduled a "formal hearing." The notice to Howes did not mention cross-examination but directed: "You will present at the hearing all witnesses and evidence known to you" on the issue of "whether the claimant is entitled to any further benefits . . . in connection with an alleged injury sustained on July 10, 1985." Strikingly, the notice of the hearing to the employer, the claimant's true adversary, emphasized the right to cross-examine:

> "The hearing itself, will consist of presentation of the claimant's own case first, followed by an opportunity for the employer to *cross examine*. The Bureau, through its legal counsel, will also have a chance to *cross examine* the witnesses. *The direct and cross examination will continue until each party has presented all of its case.* Although not required, you may want to retain legal counsel to represent you, especially since the claimant will almost always be represented by the claimant's attorney." (My emphasis).

Counsel for Howes promptly wrote the Bureau:

> "[I]f the Bureau intends to rely upon evidence not presented at the pending formal hearing, please provide me with a copy of such evidence and please consider this to be a request to cross-examine the

> person(s) furnishing such evidence pursuant to Section 28-32-07, N.D.C.C."

Counsel for the Bureau responded:

> "Enclosed is an updated copy of the file. The Bureau will rely upon the entire file in addition to evidence adduced at the hearing.
>
> "If you are requesting that persons be subpoenaed, let me know which persons."

At the outset of the hearing on August 5, 1987,

counsel for Howes stated:

> "If the Bureau intends to rely on medical evidence in the file, to which I have not been allowed an opportunity to examine the expert witnesses, I would request that opportunity prior to a decision."

The Bureau's counsel responded:

> "It's my understanding that this case is going to follow the same policy that the Bureau has used in considering the entire record, which includes medical records from various examining doctors, and the like. I believe that [counsel for claimant] has been given access to the entire file. . . . The Bureau generally has no objection to subpoenaing witnesses, but often denies the payment in connection with cross-examination. And I think that, if anything, that's what's being done here."

Counsel for Howes reiterated:

> "I . . . maintain that if the Bureau uses evidence, it's the Bureau's responsibility to make that - not simply the summary of evidence but the source of the evidence available to the claimant for examination at the Bureau's expense, as opposed to the claimant bringing in his own witnesses at the Bureau's expense."

Only Howes testified at the hearing. Howes identified his headaches as following his July 10, 1985 injury

and disclaimed any prior continuing symptoms from a childhood fall from a garage at age 6 or from an auto accident at age 15.

On September 14, 1987 the Bureau adhered to its order denying further benefits. The Bureau found:

> "IX.
>
> " . . . During the rehearing process, the Bureau undertook further investigation and review of additional evidence submitted on behalf of Mr. Howes. The Bureau's further investigation included medical assessment by a team of medical experts at Medcenter One.
>
> "X.
>
> "The greater weight of the evidence, including testimony adduced at the formal hearing and medical reports in connection with claimant's medical assessment, indicated that the claimant's continued complaints and hospitalization are not the result of the July 10, 1985, incident in the horse trailer."

Howes appealed. He expressed his issues on appeal in terms of the Bureau's duty to develop and clarify medical evidence and in terms of due process, claiming that the "Bureau's consideration of and reliance upon evidence to which Howes was not afforded the right of cross-examination clearly violated . . . due process."

I agree that Howes was effectively denied opportunity to cross-examine adverse medical experts and, therefore, did not have a fair hearing. NDCC 28-32-19(4).

We have no occasion in this case to contemplate the constitutionally dictated scope of a fair hearing. We need only apply the Administrative Agencies Practice Act, NDCC Ch. 28-32, in a uniform manner, consistent for all agencies, and specifically correlated with the mandates of

the Workers Compensation Act. The Bureau's procedures are "governed by the provisions of chapter 28-32" and the Bureau must "ascertain the substantial rights of all the parties." NDCC 65-02-11.

The Bureau seeks the power to short-cut evidentiary rules. And, for its actions apart from required trial-type hearings, we have properly recognized that the Bureau may reasonably consider its records without "an occasion to confront witnesses." *See*, for example, *Beckler v. North Dakota Workers Compensation Bureau*, 418 N.W.2d 770, 775 (N.D. 1988). But, at a trial-type hearing, the Administrative Agencies Practice Act, fairly applied, requires that a claimant be "afforded the same opportunity to present evidence and to examine and cross-examine witnesses as is permitted under section 28-32-06." NDCC 28-32-05(5).

NDCC 28-32-06 makes the practice in district court govern the admissibility of evidence "insofar as circumstances will permit." Thus, a trial-type hearing is mandated by the statute before an employee-claimant can be denied benefits when there are genuinely disputed and material facts. While the Bureau may waive the usual rules of evidence if "*necessary* to ascertain the substantial rights of all the parties," it can use "only evidence of probative value." NDCC 28-32-06. (My emphasis). Only evidence "offered and made a part of the official record of the hearing" can be considered, "except as otherwise provided in this chapter." *Id.* No exception is made for hearsay reports of experts without opportunity for cross-examination to test their opinions.

If the Bureau considers anything "in addition to the evidence presented at any formal hearing," it must do

more than just give a copy to the claimant. NDCC 28-32-07. The Bureau must *"afford"* the claimant an opportunity "to cross-examine the person furnishing such information at a . . . public hearing . . . upon at least ten days' notice." *Id.* "Afford" means, principally, "to manage to pay for or incur the cost of; . . . GIVE, FURNISH." Webster's Third New International Dictionary (1971).

Even without problems of procedural unfairness, Howe's claim appears to me to be evidentially close and difficult to weigh. Howes is not entitled to compensation benefits if his headaches in the spring of 1986 came from tensions of his loss of employment. *Choukalos v. North Dakota Workers Compensation Bureau* (Civil No. 880039; filed 8-15-88). At the other extremity of consideration, he is not entitled to benefits if his headaches came from a distant childhood incident or from symptoms existing before July 1985. But, if the more recent and apparently more severe "craniocerebral trauma" of July 10, 1985 was a substantial contributing factor to his following headaches, Howes is entitled to benefits. Ordinarily, the proximity and the seriousness of his 1985 work injury would weigh heavily in Howes' favor. The medical team's assessments did not explain why they attributed Howes' headaches after July 1985 to earlier incidents rather than the more recent and more serious trauma. It is plain that a trial-type hearing was essential to sift and weigh the facts and opinions about this claim before it could be fairly denied.

Only the "weight" of paper reports supports the Bureau's decision to attribute Howes headaches to remote incidents, in spite of Howes' testimony disputing

the seriousness of those events and disclaiming any continuing effects from them. The Bureau's findings, after the formal hearing, rest entirely on the team's written assessments, and particularly Dr. Peterson's sweeping conclusions for the team.[1] Thus, those uncritiqued and unexplained medical reports are the crucial evidence on this claim.

Full disclosure of the facts is fundamental to fact finding. Cross-examination is essential to full disclosure. Model State Administrative Procedure Act § 10(3); 2 Am. Jur.2d *Administrative Law* § 424 (1962). This court has often emphasized the crucial importance of cross-examination in a trial-type hearing when an agency sought to deny it. *Colgate-Palmolive Company v. Dorgan*, 225 N.W.2d 278, 281 (N.D. 1974). *See also Insurance Services Office v. Knutson*, 283 N.W.2d 395, 399 (N.D. 1979).

3 Larson's Workmen's Compensation Law § 79.83(a) expresses this importance eloquently:

> "Fair play rules include the right of cross-examination, rules against ex parte statements, necessity of having all evidence on the record, and restrictions on determinations made by independent investigation conducted by the tribunal. These rules are based on fundamental notions of fairness. Nothing is more repugnant to Anglo-American traditions of justice than to be at the mercy of witnesses one cannot see or challenge, or to have one's rights stand or fall on the basis of unrevealed facts that perhaps could be explained or refuted."
> (Footnotes omitted).

Justice Frankfurter, in his renowned concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) put the principle succinctly: "[A]

democratic government must . . . practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."

The Bureau's position was that Howes had opportunity to cross-examine. The Bureau offered to subpoena any of the physicians but only at Howes expense. The Bureau rationalized this severe course by disclaiming any need for its own or adverse witnesses' testimony at a formal, trial-type hearing. Instead, the Bureau urged that a claimant must obtain the testimony of any medical witness, even those adverse to him, at his own expense. The Bureau relied on NDCC 28-32-09 which says, "Any witness who is subpoenaed" under the Administrative Agencies Practice Act must "be paid by the party or agency at whose instance the witness appears or his deposition is taken."

An expert whose written opinion is adverse does not "appear" at the "instance" of a claimant. An expert's opinion is excludable hearsay and cannot fairly stand alone at a trial-type hearing unless the expert is available and "appears" at the hearing for cross-examination. NDREv 801(c). "[T]he hearsay rule is not a mere technical rule but is a basic rule of exclusion to protect the right of cross-examination." 4 Jones on Evidence § 30:7, p. 343 (1972).[2] "[W]hen a statement is offered to prove the truth of the matter asserted . . . there is a lack of the safeguards used to insure credibility of the declarant. It is this lack of an oath and cross-examination of the declarant that warrants the exclusion of evidence as hearsay." Explanatory Note, NDREv 801, North Dakota Court Rules p. 467 (West Publishing Company; 1988).[3]

Expert opinions are not excepted from the hearsay rule. NDREv 802 and 803. Medical experts are not excepted from cross-examination to test the footings of their opinions. NDREv 705. Cross-exam is the predicate for admission of a written report of an expert in a trial-type hearing.

Thus, the rules of evidence, applicable to administrative actions by NDCC 28-32-06, contradict the notion that a claimant must bear the expense of the "appearance" of an adverse witness for cross-examination. The opportunity to test an opposing witness cannot be fairly and effectively denied by imposing the cost and duty of causing his appearance on an adversary. 2 Davis, Administrative Law § 12.9.

I regard the Bureau's position as a callous misreading of the statute. To adopt its position would seriously distort the Administrative Agencies Practice Act. It would allow any agency to shift the cost of bringing an expert witness before it, by simply obtaining a written opinion and relying on it. It is not difficult to visualize that every agency would insist that petitioners were "afforded" cross-examination by the "privilege" of subpoenaing, at their own expense, adverse witnesses whose written reports the agency wants to use. That should not be.

Moreover, the Bureau's position was completely inconsistent with its duties to a claimant under the Workers Compensation Act. The Bureau did *nothing* for the hearing; only Howes offered evidence. That was not a trial-type "hearing"! *Weber v. North Dakota Workmen's Compensation Bureau*, 377 N.W.2d 571 (N.D. 1985).

Nothing in the Workers Compensation Act shifts the cost burden of probing the reasons for an adverse medical opinion to a claimant. As one would expect of most claimants, Howes was not even "able to afford any more medical bills" for his headaches, let alone expenses for depositions of physicians. The Bureau is statutorily obligated to pay the reasonable attorneys fees and costs of a claimant from its general fund "after action by the bureau which reduces or denies a claim." NDCC 65-02-08.

Furthermore, the Bureau insisted that Howes' attorney agree to "follow the guidelines of the Workmen's Compensation Bureau on payment of attorney fees and costs in my representation of the claimant" with Bureau payment "as the sole and exclusive remuneration" to the attorney. The Bureau may have reasonable discretion to limit depositions and witness examinations in proper cases, for example, where cumulative. *See* NDREv 403 and *Hayes v. North Dakota Workers Compensation Bureau,* 425 N.W.2d 356 (N.D. 1988). But, it cannot fairly prevent cross-examination by effectively shifting the entire expense of its witness to the claimant. The Bureau cannot thus renege on its duty to provide "sure and certain" relief to claimants who are statutorily excluded from "every other remedy." NDCC 65-01-01.

No administrative agency, not even the Bureau, should be allowed to effectively deny cross-examination in trial-type hearings by shifting the cost of its witnesses to claimants. Therefore, I respectfully dissent. Howes was not "afforded" an opportunity for cross-examination and was not accorded a fair hearing.

/s/ Herbert L. Meschke

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1 The majority opinion cheerfully recharacterizes "Dr. Larson [as] Howes' own doctor . . . not sought out by the Bureau as its own expert. . . ." It is true that Dr. Larson was Howes' treating physician in July, 1985, but it cannot be fairly concluded that "once the claimant's doctor, always the claimant's doctor." Dr. Larson was consulted and paid by the Bureau for the team assessment. His vague report contained no conclusion negativing Howes' claim; Dr. Peterson came up with the harsh conclusions for the team.

2 *See also* V Wigmore on Evidence § 1362, p. 3 (1974) and 4 Weinsteins on Evidence P 800(01), p. 800-10 and 11 (1988).

3 Notes of the Advisory Committee on Proposed Rules [of Evidence] said:

> "Emphasis on the basis of the hearsay rule today tends to center upon the condition of cross-examination. All may not agree with Wigmore that cross-examination is 'beyond doubt the greatest legal engine ever invented for the discovery of truth,' but all will agree with his statement that it has become a 'vital feature' of the Anglo-American system. 5 Wigmore § 1367, P. 29. The belief, or perhaps hope, that cross-examination is effective in exposing imperfections of perception, memory, and narration is fundamental. Morgan, Foreword to Model Code of Evidence 37 (1942)." *Introductory Note: The Hearsay Problem,* Federal Rules of Evidence, Federal Civil Judicial Procedure and Rules, p. 312-313 (West Publishing Company; 1988).

HOWES v. NORTH DAKOTA WORKERS COMPENSATION BUREAU

Civil No. 880036

LEVINE, Justice, dissenting.

I join in that portion of Justice Meschke's rationale that supports the conclusion that Howes was denied a fair hearing because of his inability to cross-examine, at the Bureau's expense, Dr. Peterson, an expert retained by and relied upon by the Bureau.

However, because Dr. Larson was the claimant's physician consulted at the behest of Howes' physicians and not at the behest of the Bureau, I believe that the claimant, not the Bureau, bears the burden to subpoena or depose Dr. Larson.

I would reverse to afford Howes the opportunity to cross-examine Dr. Peterson.

/s/ Beryl J. Levine

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF MORTON	SOUTH CENTRAL JUDICIAL DISTRICT
James C. Howes, Appellant, vs. North Dakota Workers Compensation Bureau, Appellee.	Civil No. 15287 *MEMORANDUM DECISION*

The Bureau had before it conflicting evidence, some of it medical. It is up to the Bureau to reconcile this evidence, and this Court on review does not substitute its judgment. The findings made are supported by a preponderance of the evidence, and the decision supported by the findings.

Appellant contends the Bureau refused him the right to cross-examine its witnesses and violated his rights to procedural due process. He also argues that 28-32-07 was violated because the Bureau relied on evidence outside the record. At the beginning of the hearing, Appellant's attorney was advised that the Bureau would consider the entire record, (Transcript page 3) and this includes the various doctors' reports. Under 28-32-06, the agency is not bound by the formal rules of evidence but instead may waive them, if necessary, to ascertain the substantial rights of the parties and the evidence is of probative value. See *Gramling vs. N.D. Workmen Comp. Bureau,* 303 N.W.2d 323. My experience in District Court has shown that it is extremely difficult and expensive to secure the attendance of doctors, and I assume the Bureau was

waiving the formal rules. The doctors' reports are then hearsay, but admissible. If appellant desires cross-examination, he must proceed under 28-32-09. 28-32-07 is not applicable to this situation as these reports were not information outside the record.

The decision is affirmed.

Dated this 14th day of December, 1987, at Mandan, North Dakota.

BY THE COURT:
/S/ William F. Hodny
WILLIAM F. HODNY
DISTRICT JUDGE

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF MORTON

James C. Howes, Appellant, v. North Dakota Workers Compensation Bureau, Appellee.	FINDINGS OF FACT CONCLUSIONS OF LAW ORDER FOR JUDGMENT CIVIL NO. 15287

The above entitled matter having come before the court on an appeal from a decision of the Commissioners of the North Dakota Workers Compensation Bureau pursuant to Chapters 65-10 and 28-32 of the North Dakota Century Code, the matter was submitted to the Honorable William F. Hodny, Judge of the South Central Judicial District Court.

The court, having duly considered the Certificate of Record and briefs by counsel for the appellant and the appellee, now makes the following Findings of Fact, Conclusion of Law and Order for Judgment.

FINDINGS OF FACT

I.

That the Findings of Fact of the Workers Compensation Bureau are in accordance with and are supported by the evidence.

II.

That the Conclusions of Law of the Workers Compensation Bureau are in accordance with the Findings of Fact, and are supported by applicable North Dakota law.

CONCLUSION OF LAW

That the order of the Workers Compensation Bureau dated September 14, 1987, must be in all things affirmed.

ORDER FOR JUDGMENT

Based upon the decision of this Court dated the 14th day of December, 1987, and the above Findings of Fact and Conclusion of Law, IT IS HEREBY ORDERED that the order of the Workers Compensation Bureau dated September 14, 1987, is in all things affirmed;

IT IS FURTHER ORDERED that the record be remanded to the North Dakota Workers Compensation Bureau.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 30 day of December, 1987.

BY THE COURT:
/S/ William F. Hodny
William F. Hodny
Judge of District Court

BEFORE THE NORTH DAKOTA
WORKERS COMPENSATION BUREAU
BISMARCK, NORTH DAKOTA

STATE OF NORTH DAKOTA COUNTY OF BURLEIGH	SS	CLAIM NO. 268,070 EMPLOYER ACCOUNT NO. 86767
In the Matter of the Claim of JAMES C. HOWES for compensation from the North Dakota Workers Compensation Fund.		ORDER AFFIRMING ORDER DENYING FURTHER BENEFITS

The Commissioners of the North Dakota Workers Compensation Bureau having reviewed the evidence adduced at the hearing together with a review of the entire record in this case, make the following:

FINDINGS OF FACT

I.

James C. Howes filed for workers compensation benefits on or about July 26, 1985, in connection with a compensable injury on July 10, 1985.

II.

On the date of injury, claimant was a 20 year old male laborer employed by Leingang Steel Siding of Mandan, North Dakota.

III.

Claimant alleged his injury occurred when while loading windows during the courts of his employment, he hit his head on a bar connected to a horse trailer.

III.

Although the claimant did not lose consciousness he did develop painful symptoms that increased after work on the same day.

IV.

Claimant subsequently sought medical treatment and was diagnosed as having experienced a craniocerebral trauma.

V.

The Bureau accepted the claim and paid benefits in connection therewith.

VI.

The claimant subsequently returne to work on July 22, 1985.

VII.

On March 20, 1986, medical evidence indicated that the claimant may be having seizures and that it may be wise for him not to return to work.

VIII.

The Bureau subsequently determined that the claimant had a history of syncopal episodes prior to an automobile accident in October of 1980, and that the greater weight of the evidence did not indicate that the claimant's syncopal episodes or more recent medical complaints were causally related to July 10, 1985, employment injury.

IX.

Accordingly, the Bureau denied further benefits on October 6, 1986. Claimant subsequently requested and was granted a rehearing before a commissioner of the North Dakota Workers Compensation Bureau. During the rehearing process, the Bureau undertook futher investigation and review of additional evidence submitted on behalf of Mr. Howes. The Bureau's further investigation

included medical assessment by a team of medical experts at MedCenter One.

X.

The greater weight of the evidence, including testimony adduced at the formal hearing and medical reports in connection with claimant's medical assessment, indicated that the claimant's continued complaints and hospitalization are not the result of the July 10, 1985, incident in the horse trailer.

XI.

The greater weight of the evidence does not indicate that claimant's continued problems are causally related to the July 10, 1985, injury.

CONCLUSIONS OF LAW

The claimant has failed to prove that he is entitled to further benefits under the North Dakota Workers Compensation Act, over and above those benfits previously awarded and paid.

ORDER

IT IS ORDERED that the Order Denying Further Benefits dated October 6, 1986, is in all things affirmed in accordance with the above Findings of Fact and Conclusions of Law;

IT IS FURTHER ORDERED that further rehearing is in all things denied;

IT IS FURTHER ORDERED that a copy of this order be served on all parties in interest, as provided by law.

Dated this 14th day of September, 1987.

/s/ Katherine Satrom
Katherine Satrom, Chairman

/s/ Richard Mikkelson
Richard A. Mikkelson,Commissioner

/s/ _____
Quentin Retterath, Commissioner

BEFORE THE NORTH DAKOTA
WORKMEN'S COMPENSATION BUREAU
BISMARCK, NORTH DAKOTA

STATE OF NORTH DAKOTA COUNTY OF BURLEIGH	) SS)	CLAIM NO. 268070 EMPLOYER ACCOUNT NO. 86,767

In the Matter of the Claim of JAMES C. HOWES for compensation from the North Dakota Workmen's Compensation Fund.	)	ORDER DENYING FURTHER BENEFITS

The Commissioners of the Workmen's Compensation Bureau reviewed the entire file in this case, and based upon that review make the following:

FINDINGS OF FACT

I.

An application for workmen's compensation benefits was filed on July 26, 1985, in connection with an alleged injury on July 10, 1985.

II.

On the alleged date of injury the claimant was employed by Leingang Steel Siding to work in the warehouse.

III.

Claimant alleges he sustained a head injury when he hit his head on a bar as he came out of a horse trailer on July 10, 1985.

IV.

Claimant's condition was diagnosed as a craniocerebral trauma.

V.

The Bureau accepted liability in this case, paid medical expenses, and paid disability benefits from July 7, 1985, through July 21, 1985.

VI.

Claimant returned to work on July 22, 1985.

VII.

On March 20, 1986, claimant's physician indicated that the claimant may be having seizures and it would be wise for him not to work.

VIII.

A medical report dated March 20, 1986, states that the claimant had a head injury in 1981, with symptoms similar to his current symptoms.

IX.

The claimant was hospitalized from April 26, 1986, through May 14, 1986, for severe headaches. He underwent psychological testing and evaluations and it was reported that he had no problems with his memory.

X.

Claimant's physician indicated that he believed a great deal of the claimant's headaches were related to tension.

XI.

Claimant's medical history indicates that he had been having syncopal episodes prior to an automobile accident in October, 1980. The syncopal episodes went away after the claimant started medication.

XII.

The greater weight of the evidence indicates that the claimant's current condition is not in any way related to his employment injury on July 10, 1985.

CONCLUSIONS OF LAW

I.

The claimant has failed to prove that he remains disabled as a direct result of the injury dated July 10, 1985.

II.

The claimant has failed to prove that he is entitled to further benefits under the North Dakota Workmen's Compensation Act over and above those previously awarded and paid.

ORDER

IT IS ORDERED that benefits over and above those previously awarded and paid, or those provided for by the terms of this order, in connection with the claimant's injury of July 10, 1985, are in all things denied;

IT IS FURTHER ORDERED that a copy of this order be served on all parties in interest, as provided by law.

Dated this 6th day of October, 1986.

NORTH DAKOTA WORKMEN'S COMPENSATION BUREAU

/s/ Katherine Satrom
Katherine Satrom, Chairman

/s/ Richard Mikkelson
Richard A. Mikkelson, Commissioner

/s/ Quentin Retterath
Quentin Retterath, Commissioner

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT

File No. 880036

Appeal from the District Court of Morton County.

James C. Howes, **Appellant**

v.

North Dakota Workers Compensation Bureau, **Respondent and Appellee**

and

Leingang Steel Siding, **Respondent**

This appeal having been heard by the Court at the May, 1988, term before:

The Honorable Ralph J. Erickstad, Chief Justice; the Honorable Gerald W. VandeWalle, the Honorable H. F. Gierke III, the Honorable Herbert L. Meschke, the Honorable Beryl J. Levine, Justices;

and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the judgment of the court below be and the same is hereby AFFIRMED.

It is further ordered and adjudged that Appellant have and recover from Appellee costs and disbursements on this appeal, to be taxed and allowed in the court below pursuant to Section 65-10-03, N.D.C.C.

Dated: September 20, 1988.

By the Court:
/s/ Ralph J. Erickstad
Chief Justice
North Dakota Supreme Court

Attest: /s/ Luella Dunn
Clerk of the Supreme Court
Seal

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF MORTON

James C. Howes, Appellant, v. North Dakota Workers Compensation Bureau, Appellee.	)	JUDGMENT CIVIL NO. 15287

The court having considered this matter and having made its Findings of Fact and Conclusion of Law, and having ordered judgment thereon, it is hereby:

ADJUDGED AND DETERMINED that the order of the North Dakota Workers Compensation Bureau as entered on the 14th day of September, 1987, be hereby in all things affirmed.

Dated this 19 day of January, 1988

/s/ Kathy Marshall
Kathy Marshall
Clerk of District Court

Supreme Court, U.S.
FILED
JAN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-964 (2)

In The

Supreme Court of the United States

October Term, 1988

JAMES C. HOWES,

Petitioner,

v.

NORTH DAKOTA WORKERS COMPENSATION BUREAU AND LEINGANG STEEL SIDING,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. WHETHER THE CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS REQUIRES A STATE AGENCY TO PAY THE COSTS AND EXPENSES ASSOCIATED WITH THE ATTENDANCE OF A CLAIMANT'S WITNESSES AT AN ADMINISTRATIVE HEARING.

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No. 88-964

In The

Supreme Court of the United States

October Term, 1988

JAMES C. HOWES,

Petitioner,

v.

NORTH DAKOTA WORKERS COMPENSATION BUREAU AND LEINGANG STEEL SIDING,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of North Dakota

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The North Dakota Workers Compensation Bureau (Bureau) is a state administrative agency charged with administering the North Dakota workers compensation fund and laws. *See* North Dakota Century Code (N.D.C.C.) title 65. In determining whether a claimant is entitled to benefits, the Bureau follows the procedures established by the North Dakota Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. To receive benefits from the Bureau, a claimant must prove by a preponderance of

the evidence that an injury is causally related to employment and that the ensuing disability is causally connected to the employment injury. If the Bureau terminates benefits, a claimant has the burden of proving his or her right to continue receiving benefits.

James Howes sustained an employment-related injury at Leingang Steel Siding on July 10, 1985. He was hospitalized for a period of several days following the injury. Howes returned to employment with Leingang Steel Siding on July 22, 1985. On July 23, 1985, he filed a medical expense claim with the Bureau. The Bureau accepted Howes' claim and awarded him medical expense benefits and disability benefits for his hospitalization and treatment and lost wages in connection with the work-related injury.

Howes was discharged from his employment with Leingang Steel Siding in March, 1986, because of his poor work attitude and performance. On April 26, 1986, through May 14, 1986, Howes was hospitalized because he suffered severe headaches. Howes then requested additional medical expense benefits and disability benefits.

The Bureau issued a formal order denying additional benefits on October 6, 1986. After the Bureau issued that order, Howes submitted a request that the Bureau schedule (at Bureau expense) the deposition of a neurologist, Dr. Larson. Dr. Larson had treated Howes since the early 1980's, and he had examined Howes both at the time of his hospitalization in 1985 and when he was hospitalized again in 1986. In response to Howes' request, the Bureau sent a letter to Dr. Larson asking questions relating to

Howes' case. Dr. Larson responded with a letter suggesting that the Bureau schedule a comprehensive evaluation at a hospital. The Bureau then scheduled a comprehensive medical assessment and paid all the costs of the assessment.

The team of experts conducting the assessment included several medical doctors and other medical professionals. The team conducted tests and was unable to find a causal connection between the injury Howes sustained on July 10, 1985, and his subsequent hospitalization on April 26, 1986. The team did find evidence that Howes' headaches may be related to previous injuries not related to Howes' employment. Coincidentally, Dr. Larson was a member of the team of experts who examined Howes at the Bureau's request.

The Bureau then scheduled a formal hearing for August 5, 1987. Prior to that hearing Howes did not make any specific requests to cross-examine any expert witnesses other than Dr. Larson. Howes' request that the Bureau schedule Dr. Larson's deposition was made before the Bureau scheduled the comprehensive medical assessment. At the hearing, Howes made a general demand to be given an opportunity to cross-examine expert witnesses who had submitted documents to the Bureau, if the Bureau intended to rely on those documents. The demand included the opportunity to cross-examine Dr. Larson and would have required the Bureau to pay all costs and expenses for examination of all expert witnesses.

In response to this general demand, Howes was informed that the Bureau would not assume the costs.

North Dakota law granted Howes the opportunity to cross-examine medical experts whose opinions were a part of the record the Bureau relied upon in making decisions regarding Howes' claim. However, North Dakota law did not require the Bureau to pay for the costs of deposing Dr. Larson. *See* N.D.C.C. § 28-32-09. Howes testified at the hearing but did not present testimony from any other witnesses. On September 14, 1987, the Bureau issued an order affirming its previous order denying further benefits to Howes.

SUMMARY OF ARGUMENT

This is not an appropriate case for review upon writ of certiorari because (1) this case does not present any important question of federal law and (2) the decision below is consistent with this Court's decisions on the right to procedural due process.

Howes' choice to forego cross-examination of his treating physician at his hearing because he would have had to pay the costs of that examination does not present an important question of federal law. North Dakota law requires the Bureau to pay the claimant's attorney's fees and costs on appeal. N.D.C.C. § 65-02-08. North Dakota law places the expense of witness fees upon the party calling the witness to testify at an administrative hearing. N.D.C.C. § 28-32-09. The decision regarding the allocation of costs associated with the attendance of witnesses at administrative hearings is a legislative function.

Howes was not denied his fundamental right to confront and cross-examine witnesses. Dr. Larson was

Howes' treating physician. Howes received notice and an opportunity for a hearing. He was given complete access to the Bureau's files and all the medical reports prior to the hearing. He was given the opportunity to present evidence to the Bureau. His attorney's fees and appeal costs were paid by the Bureau. Finally, Howes received a hearing and judicial review of the Bureau's decision. There are no special or important reasons why this Court should grant certiorari in this case.

ARGUMENT

The petitioner has failed to set out special or important reasons why this Court should grant a writ of certiorari in this case. There are several substantial reasons why the petition should be denied.

I. THIS CASE DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court established the requirements for due process in administrative proceedings involving the termination of public assistance payments. This Court decided that procedural due process requires timely and adequate notice of the hearing as well as an opportunity to defend at the hearing by confronting any adverse witnesses and by presenting evidence.

The Bureau did not deny these procedural remedies to Howes and imposed no procedural limitations on Howes' ability to assert his rights. Howes received notice and an opportunity for a hearing. Prior to the hearing he

received complete access to the Bureau's files and all medical reports. He was allowed to present evidence to the Bureau. Howes had the opportunity to have Dr. Larson attend the hearing. Howes chose to forego the opportunity because the Bureau would not pay the anticipated costs. Howes' attorney's fees and appeal costs were paid by the Bureau. He received judicial review of the Bureau's decision. Thus, all of the procedural due process requirements specified in *Goldberg v. Kelly*, 397 U.S. 254 (1970), were met. Howes' petition for certiorari, therefore, rests upon the narrow claim that the Constitution requires the Bureau to pay the costs associated with the attendance and examination of his treating physician at the administrative hearing.

North Dakota law granted Howes, upon written request, the opportunity to cross-examine medical experts whose opinions were part of the record relied upon by the Bureau. The costs of taking depositions and subpoenaing expert witnesses for cross-examination are governed by N.D.C.C. § 28-32-09, which reads in relevant part:

> **28-32-09. Subpoena and attendance of witnesses.** . . . The deposition of a witness or party in any proceeding before an agency may be taken in the same manner and on the same notice as in a civil action pending in the district court. Interrogatories may be sent to any witness or party in any proceeding in the same manner and on the same notice as in an action pending in the district court. A party, other than the administrative agency, must first show good cause before undertaking discovery proceedings, including interrogatories. Any witness who is subpoenaed under the provisions of this section and who appears at the hearing, or whose deposition is

> taken, shall receive the same fees and mileage as a witness in a civil case and in the district court, and such fees shall be paid by the party or agency at whose instance the witness appears or his deposition is taken.

In *Froysland v. North Dakota Workers Compensation Bureau*, Civil No. 880155 (N.D. December 6, 1988), the North Dakota Supreme Court held that N.D.C.C. § 28-32-09 requires the Bureau to bear the costs of discovery of expert witnesses when the witnesses were originally retained by the Bureau and their opinions were relied upon to refute the conclusions of the claimant's treating physician. The court distinguished the decision in Howes' case by noting that Howes wanted to cross-examine his own physician rather than one relied upon by the Bureau to refute Howes' claim.

This case does not present a substantial question of procedural due process. Howes was clearly given the opportunity to present his case to the Bureau. Rather, it involves a question relating to the allocation of costs for the attendance of witnesses at administrative hearings. Decisions regarding the allocation of such costs have traditionally been a state, legislative function and responsibility. 3 *Larson Workmen's Compensation Law*, § 83.20 (1988).

The North Dakota Legislature's decision to have claimants pay their witness costs in these cases does not violate claimants' procedural due process rights. Due process is a flexible concept and the procedural protections required are dependent upon the factual situation. *Morrissey v. Brewer*, 408 U.S. 471 (1972). Procedural due process requirements are shaped, in part, by the risk of

error inherent in the truth-finding process. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

A medical assessment of a worker's physical condition is a focused decision which is based upon standard reports by physician specialists. The information the Bureau uses to decide whether to extend or deny benefits is contained in medical test results and opinions, all of which the Bureau provides to the claimant's attorney prior to a hearing. In such circumstances, the "specter of questionable credibility and veracity is not present." *Richardson v. Perales*, 402 U.S. 389, 504 (1971). Therefore, the statutory allocation to Howes of the costs associated with the attendance of Howes' expert witnesses at his hearing is a considered decision that does not fundamentally affect the truth-finding process or violate the fourteenth amendment.

II. THE DECISION OF THE NORTH DAKOTA SUPREME COURT IS CONSISTENT WITH THIS COURT'S DECISIONS ON THE RIGHT TO PROCEDURAL DUE PROCESS.

Howes has not cited any cases in which this Court has found a constitutional duty on the part of a state agency to pay the claimants' costs of securing their witnesses' testimony at a hearing. The case petitioner cites as allegedly being in conflict with the North Dakota Supreme Court decision here is *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). *Loudermill* is not on point. That case concerned the necessity of providing notice and an opportunity to be heard to public employee's who have a property interest in their job before that employment is terminated. *Loudermill* did not

concern who had to pay for the examination of Loudermill's witnesses.

In *Richardson v. Perales*, 402 U.S. 389 (1971), this Court held that the requirements of procedural due process were not violated by the admission into evidence of medical reports (hearsay evidence) at an administrative hearing concerning a claimant's eligibility for Social Security disability benefits. In that case, the claimant asserted that he was denied the right of cross-examination; however, he had the opportunity to examine the evidence prior to the hearing and he also had the right to request subpoenas for the physicians. The Court held that the right of cross-examination was not denied.

Howes attempts to distinguish the Court's decision in *Richardson* from this case because the Social Security Administration was required to pay the costs of securing the physician's attendance at the hearing. The fact that the Social Security Administration was obligated to pay the cost when subpoenas were requested was inconsequential to the Court's decision. The Court's decision was based upon the fact that Perales had the right to examine the written medical reports prior to his hearing and he also had the opportunity to examine the authors of the reports at the hearing. Howes had similar opportunities. His right to procedural due process was not denied.

Prior decisions of this Court support the North Dakota Supreme Court's decision here. This Court has held that the decisions of the legislative branch with regard to procedural due process remedies are entitled to appropriate weight. *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985). This Court has also

held that considerations of cost must play a role in deciding the level of procedural protection a property right should receive. *Ingraham v. Wright,* 430 U.S. 651 (1977). In *Matthews v. Eldridge,* 424 U.S. 319 (1976), this Court established that the fiscal and administrative burdens of additional or substitute procedural requirements must be considered when determining the requirements of procedural due process.

The North Dakota Supreme Court wisely recognized and balanced these considerations in Howes' case and in its decision in *Froysland v. North Dakota Workers Compensation Bureau,* Civil Number 880155 (N.D. December 6, 1988). Requiring the Bureau to pay the costs of deposing Howes' physician would impose substantial expense and administrative burdens upon the North Dakota workers compensation fund. The Legislature is best equipped to balance this expense against competing interests and to prescribe the means of allocating expenses associated with the conduct of administrative hearings.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Dated this 9th day of January, 1989.

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